Supreme Court, U.S.
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No. 94-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONNA HEILWEIL,

Petitioner,

—v.—

MOUNT SINAI HOSPITAL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Aaron J. Schindel
Seth M. Popper
PROSKAUER ROSE GOETZ
& MENDELSOHN
Attorneys for Respondent
1585 Broadway
New York, New York 10036
(212) 969-3000

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether an employee who, during the relevant time period, claimed to be medically unable to work in one particular location because of her adverse reaction to the particular environment of that site was an "individual with handicaps" as that term is defined in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.* (1994). The Court below held that such a person was not an "individual with handicaps."

Whether an employee can be considered an "individual with handicaps" within the meaning of the Rehabilitation Act on the basis of a latent medical condition that, at the time of the employee's termination, produced no symptoms and was unknown to both the employee and the employer. The Court below answered in the negative.

Does the unanimous decision of the Court of Appeals for the Second Circuit, which was in accordance with the decisions of every federal appellate court that has addressed the issue, merit review by this Court?

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COUNTERSTATEMENT OF THE CASE

PRELIMINARY STATEMENT

In her zeal to obtain review, Petitioner has grossly distorted both the issues presented to the court below and the scope and meaning of the court's decision. The decision below stands for two propositions, neither of which conflicts with the determinations of this Court or of any other circuit or portends any diminution or alteration of the federal Rehabilitation Act.

The court below decided, as has every other circuit that has addressed the issue, that a person who is unable to perform a particular job or to work in a particular location does not have an impairment that "substantially limits one or more major life activities" and, therefore, is not an "individual with handicaps" as that term is defined in the Rehabilitation Act.

The court's second unremarkable holding was that a latent medical condition that produced no symptoms and was unknown to both employer and employee at the time the employee was discharged cannot form the basis for a Rehabilitation Act claim. The statute, of course, imposes no obligation of prescience, and Petitioner can cite no contrary authority.

The court below did not decide, as Petitioner now urges, that the duty to accommodate a permanent disability can be avoided by providing merely a temporary accommodation. No such question was presented. Nor did the court below deviate, as Petitioner claims, from the limitations of a motion for summary judgment. There was no genuine dispute as to any material fact; indeed, virtually all the facts were taken from Petitioner's own deposition testimony and contemporaneous notes. Based on Petitioner's own statements, the court concluded, as a matter of law on the undisputed facts, that Petitioner was not an "individual with handicaps" under the statute.

COUNTERSTATEMENT OF FACTS

In the spring of 1989, Petitioner Donna Heilweil told her supervisor at The Mount Sinai Hospital (the "Hospital") that she could not work in the Hospital's Blood Bank, where she was employed as Administrator, because something in the unique environment of that location (a combination, according to Petitioner, of heating oil and natural gas fumes, soiled linen odors and temperature fluctuations) exacerbated her asthma and made her ill. She was asked to provide supporting medical documentation, but refused to do so. Nevertheless, she was allowed to stop working in that area, and her symptoms disappeared. She then told the Hospital that she was "feeling fine" and was experiencing no further medical problems.

These were the operative facts in June 1989, when Heilweil commenced this suit under the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.* (1994), to compel the Hospital to retain her as Administrator of the Blood Bank despite her refusal to ever set foot in that location, and these were still the operative facts in August 1989 when the Hospital, having been unable to find another position for her (and being unwilling to let her remain as Administrator of the Blood Bank *in absentia*), let her go. Indeed, these were still the operative facts a year later, when Heilweil was deposed in this action. She was still feeling well and was still able to engage in all major life activities without significant limitation.

Heilweil filed a complaint in the United States District Court for the Southern District of New York on June 27, 1989 (prior to the termination of her employment at the Hospital), alleging violation of the Rehabilitation Act.[1] After the completion of discovery, the Hospital moved for summary judg-

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[1] She also asserted three pendent state-law claims, and later amended her complaint to add a claim of pregnancy discrimination under Title VII, 42 U.S.C. § 2000e-5 (1994). These other claims have all been withdrawn or dismissed. The only issue presented to this Court is the claim under the Rehabilitation Act.

ment on the grounds that Heilweil was not an "individual with handicaps" as that term is defined in the Rehabilitation Act. In response to that motion, Heilweil submitted new documentation regarding her medical condition. These medical records indicated that in 1991—two years after her discharge and the commencement of this litigation—Heilweil was diagnosed with "pansinusitis," a respiratory infection of the sinuses, and possibly "bronchiectasis," an ailment affecting the lungs. The medical documents submitted suggested that these conditions may have originated in latent conditions existing prior to 1991.

OPINIONS BELOW

The District Court held, on the undisputed facts before it, that Heilweil was not an "individual with handicaps" under the Rehabilitation Act, and dismissed the claim.

Specifically, Judge Richard Owen said:

> The Federal Rehabilitation Act prohibits programs receiving federal financial assistance from discriminating against handicapped individuals solely because of their handicaps. One definition of a handicapped person "is one who (i) has a physical or mental impairment which *substantially limits* one or more of such person's major life activities," 29 U.S.C. 706(8)(B) (1992) (emphasis added). "Breathing" and "working" are "major life activities" within the meaning of the Act. 45 C.F.R. Part 84.3(j)(2)(ii). "Physical impairments" include respiratory conditions under the Act. 45 C.F.R. 84.3(J)(2)(1).
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> While plaintiff's respiratory condition was severely exacerbated by working in the blood bank, it only happened in the bank and she, in her words at the time of her deposition, felt "fine now that I haven't been in the blood bank for several months, ..." Also she was then swimming one half hour a day as a substitute for

> weight lifting and jogging, she testified. Under these circumstances, plaintiff's condition *as it existed in or about* June 1989 did not substantially limit one or more of her life activities, and therefore, she was not "handicapped" within the meaning of the Act. An impairment which only renders one unable to perform one particular job is not a handicapped person within the meaning of the Act. *See Welsh v. City of Tulsa*, No. 91-5138, 1992 U.S. App. LEXIS 27249 [977 F.2d 1415] (10th Cir. October 23, 1992); *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir. 1992)[, *cert. denied*, 113 S. Ct. 1255 (1993)]; *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasny* (sic) *v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985.

Slip Op. (July 30, 1993), Appendix to Pet. for Writ of Cert. at 18a (footnote omitted).[2]

The Court of Appeals for the Second Circuit affirmed. *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994). Writing for a unanimous court, Judge Cardamone carefully reviewed the statute, the applicable regulations, and the substantial body of case law that has developed on the question of what level of "impairment" is needed to come within the purview of the Act.[3] He concluded, as had the District Court,

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[2] In her Petition, Heilweil claims that "[t]he District Court reasoned . . . that the decision to terminate was not discriminatory because it was made at a time when Heilweil was not disabled." Pet. for Writ of Cert. at 7. This characterization—suggesting that the court had mistaken remission of symptoms for absence of disability—is a disingenuous distortion of the District Court's holding. The court held that, regardless of whether her symptoms were active or dormant, Heilweil was not an "individual with handicaps" within the meaning of the Rehabilitation Act because her impairment rendered her "unable to perform one particular job" and did not "substantially limit one or more of her life activities." Slip. Op. (July 30, 1993), Appendix to Pet. for Writ of Cert. at 18a.

[3] The statute expressly provides that not every "impairment" renders one an "individual with handicaps" entitled to statutory protection. Only a person who has an impairment that "substantially limits one or more of such person's major life activities" is covered by the statute. 29 U.S.C. § 706(8)(B) (1994).

that "plaintiff's own statements and those of her doctor [proved] that it was the conditions in the blood bank that worsened her asthmatic symptoms, leaving no genuine issue of material fact as to what caused her respiratory problems at her place of employment." *Id.* at 723.

The court acknowledged that both breathing and working are "major life activities," but, on the undisputed facts, Petitioner's ability to engage in these activities was not substantially limited. With respect to the activity of breathing, Petitioner's own statements to the Hospital in 1989, and her testimony at deposition a year later, established that once she stopped working in the Blood Bank she suffered no respiratory difficulties: she told the Hospital that she felt "fine" after she stopped working in the Blood Bank; she stopped taking medication; she stopped seeing a doctor; she gave birth to a healthy baby girl; and she engaged in regular exercise.

With respect to her ability to work, the court held, in accordance with its own precedent,[4] and the decisions of "every circuit to visit th[e] issue," that "a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working." *Id.* at 723. Again, Petitioner's own contemporaneous statements, the allegations in her complaint, and her testimony at deposition, all established that her ability to work in general was not substantially limited, so long as she did not have to go into the Blood Bank.

Finally, the Second Circuit rejected Heilweil's attempt to rely on the 1991 medical records submitted in response to the Hospital's motion, holding that this subsequent medical evidence was not "probative on the issue of whether or not [Heilweil] was a handicapped person under the Act" in 1989. *Id.* at 724. Noting Petitioner's specific refusal to provide medical documentation in 1989 when the Hospital asked her to do so, Judge Cardamone concluded that she could not "now com-

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[4] *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989).

plain that she was discharged based on information that she may have been suffering from a different condition at the time she was terminated, when concededly neither she nor Mount Sinai was aware of it." *Id.* Petitioner's argument that the subsequent medical evidence was probative of her condition in 1989 was also rejected, because "an employer is only responsible for employment decisions based on information available to it when it decides." *Id.* at 725 (citations omitted).

REASONS WHY REVIEW IS NOT WARRANTED

I. Heilweil Was Not An "Individual With Handicaps" As Defined In The Rehabilitation Act Of 1973.

The Rehabilitation Act provides that no "otherwise qualified individual with handicaps"[5] may be discriminated against solely on the basis of that handicap by any program or activity that receives federal financial assistance. 29 U.S.C. § 794 (1994). The statute defines an "individual with handicaps" as a person,

> who (i) has a physical or mental impairment which *substantially limits* one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B) (1994) (emphasis added). On this definition, and taking Heilweil's own version of the material facts, the courts below concluded that Heilweil was not an "individual with handicaps" under the Rehabilitation Act.

Among the factors to be considered in determining whether a particular individual qualifies as an "individual with handicaps" under the Rehabilitation Act are the number and types

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[5] The Act was amended in 1992 (Pub. L. No. 102-569, 106 Stat. 4344-4488 (codified as amended at 29 U.S.C. §§ 701, *et seq.* (1992))) to, among other things, substitute the words "a disability" for "handicaps," but was not materially altered with respect to any issue now before this Court.

of jobs an impaired individual is unable to perform due to his or her impairment. *See Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985).

In its decision below, the Second Circuit, like every other federal appellate court that has addressed the issue, held that impairments or conditions that prevent an individual from performing a particular job or working in a particular location are not sufficient to establish a "handicap" under the Rehabilitation Act. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994); *Gupton v. Virginia*, 14 F.3d 203 (4th Cir.), *cert. denied*, 115 S. Ct. 59 (1994); *Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993); *Byrne v. Board. of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Welsh*, 977 F.2d at 1419; *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993); *Jasany*, 755 F.2d at 1249.

To meet the requirements of the statute, Petitioner had to demonstrate that her asthmatic condition "substantially limit[ed]" one or more of her "major life activities." The mere presence of an "impairment" (in this case, asthma) does not meet the definition of "individual with handicaps" under the Rehabilitation Act. See *Harris v. Adams*, 873 F.2d 929, 933 (6th Cir. 1989) (plaintiff failed to demonstrate that his asthma substantially limited any of his major life activities). The record here, based on Petitioner's own testimony and contemporaneous notes, did not support her claim.

Thus, the undisputed facts established that the only limitation that either Petitioner or the Hospital knew about in 1989—when the Hospital took the actions at issue in this lawsuit—was that Petitioner was unable to work in the Blood Bank.[6] She did not claim that she was unable to work any-

[6] Petitioner was specifically asked to provide medical documentation of her condition, and she refused to do so. This fact alone makes this case a singularly inappropriate vehicle for this Court's review. She attempts to avoid this consequence of her refusal to provide medical doc-

where other than the Blood Bank. To the contrary, her complaint asserted that she should have been permitted to administer the Blood Bank from some other location in the Hospital. As her "impairment" did not "substantially limit" her ability to breathe or work or engage in any other "major life activities," she was not an "individual with handicaps" under the Rehabilitation Act.[7]

Contrary to Petitioner's claims, there is no conflict among the Courts of Appeal. All that have addressed the issue agree that the statutory definition of an "individual with handicaps" is not met by an impairment that limits an individual's ability to perform only a narrow range of jobs or to work only in a narrow range of locations. Petitioner's reliance on *Ackerman v. Western Elec. Co.*, 643 F. Supp. 836 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988), and *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982), is misplaced.

Although the district courts in *Ackerman* and *Vickers* may have applied the definition of "individual with handicaps" in an overly expansive manner, the Ninth Circuit subsequently made clear that it concurred with the prevailing view that "in order

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umentation by arguing that the Hospital must have known her condition because she obtained treatment there. By law, however, her patient records were confidential and could not be disclosed without her consent. *See* N.Y. Comp. Codes R. & Regs. tit. 10, §§ 405.1(12)-(13), 405.10 (1994).

[7] Heilweil argues that the courts below improperly resolved an alleged factual dispute as to precisely when the decision to terminate her employment was made. She claims the decision was made in March 1989, *i.e.* while she was suffering respiratory distress from exposure to the environment in the Blood Bank, rather than in June 1989, after her symptoms had cleared up. Pet. for Writ of Cert. at 11-12. Although even her own contemporaneous notes do not support the claim she now makes (as the courts below noted), her argument simply misses the point. The timing of the decision to terminate her employment is not material to the issues in this case. Regardless of whether the decision was made in March or June, at *no* time was Heilweil an "individual with handicaps" under the Act, because at *all* relevant times she never suffered from anything but an inability to work in the Blood Bank.

to come within the protection of the statute, the impairment must substantially limit an individual's employability generally, and not just with respect to one particular job." *Miller v. AT&T Network Sys.*, 722 F. Supp. 633, 639 (D. Ore. 1989), *aff'd on the op. below*, 915 F.2d 1404 (9th Cir. 1990). Moreover, there was no discussion in *Ackerman* of the extent to which the plaintiff's condition substantially limited one or more of her major life activities, although the court did note that the plaintiff had been out of work for ten months due to her asthma and could return to work only under the general restrictions to avoid dust and heavy exercise. *Ackerman*, 643 F. Supp. at 842. The Ninth Circuit, in affirming the district court's decision, did not discuss this issue. Similarly, in *Vickers*, the court specifically noted, without elaboration, that the plaintiff's "hypersensitivity" to tobacco smoke "does in fact limit at least one of his major life activities." *Vickers*, 549 F. Supp. at 87. In the present case, however, Petitioner was unable to work in the unique environment of only one location.

Petitioner's reliance on *Byrne v. Board. of Educ.*, *supra*, is also misplaced. In *Byrne*, the Seventh Circuit made clear that its view of the law is no different from that of the Second Circuit and all the other circuits that have addressed the issue. As the court specifically noted in *Byrne*: "It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally." *Byrne*, 979 F.2d at 565. The *Byrne* court, noting the existence of "conflicting" evidence concerning the plaintiff's condition, held that the question of handicap status was properly submitted to the jury (which ruled in favor of the employer). No such conflicting evidence was presented here.

Accordingly, on the undisputed facts in this record, at the time of the events complained of Petitioner did not meet the definition of an "individual with handicaps" as defined in the Rehabilitation Act. The Second Circuit's decision to that effect was entirely correct.

II. Petitioner's Argument That The Second Circuit's Decision Creates An Exception That Swallows The Rule Ignores The Record And Mischaracterizes The Decision Below.

Petitioner repeatedly states that the record demonstrates that she suffered from a "permanent disability." Based on this characterization, she contends that the court below has carved out an exception to the Act that, she contends, swallows the rule; to wit: An employer has the right to terminate an employee with a "permanent disability" after the symptoms associated with the "permanent disability" subside because the employer had removed the employee from the "workplace stimulus" that caused these symptoms.

This argument is simply not applicable to the facts here, and misrepresents the scope of the decision below. As a matter of law, Petitioner was not an "individual with handicaps" because her impairment did not "substantially limit one or more of [her] major life activities." Therefore, she was not, for purposes of this law, "permanently disabled." Thus, her claims as to the scope of the lower court's decision are false and misleading. The issue raised and resolved on the Hospital's motion for summary judgment was whether, at the time of the acts of which she complains, Petitioner's condition rendered her an "individual with handicaps" as defined under the statute. The court below appropriately answered this question in the negative.

The court below did not reach any of the broader issues Petitioner suggests, nor can its decision properly be read to permit employers to circumvent the Act as she presently alleges. Specifically, she argues that an employer could provide a temporary accommodation for a disabled individual, then discharge the employee with impunity. Of course, the court below said no such thing. The issue of what an employer may or must do with respect to an "individual with

handicaps" was never addressed, because Petitioner never crossed that threshold.

III. The Court Below Properly Rejected Medical Evidence Discovered After The Events In Issue.

In her response to the Hospital's summary judgment motion, some three years after the events giving rise to this lawsuit, Petitioner proffered the affidavit of her then-current physician. The evidence provided was to the effect that, beginning in 1991 (almost two years after she had commenced this lawsuit), Heilweil was diagnosed with having (or possibly having) bronchiectasis and pansinusitis, which her doctor believed might have originated in latent conditions existing in or before 1989. The Second Circuit held that this information did nothing to assist Petitioner's claim that the Hospital had discriminated against her in 1989. Petitioner challenges this determination.

To the extent that her after-acquired evidence was offered to prove that Petitioner was an "individual with handicaps" in 1991 (or thereafter), it is plainly irrelevant. Obviously, a person who was not "handicapped" at one time may become "handicapped" at a later date. The issue is not whether Heilweil is handicapped now, or was handicapped in 1991, but whether she was handicapped (within the meaning of the Act) in or about March-June 1989. Under her theory, because Heilweil had said that she was able to work anywhere but the Blood Bank (because the unique environment of that room exacerbated her asthma), the Hospital was required by law to accommodate a different condition that Heilweil did not then claim to have and that would not manifest itself until years later.[8]

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[8] *See* Pet. for Writ of Cert. at 12, where Heilweil suggests that the Courts below erred by finding that she was not "significantly impaired" in June 1989 when "that subject assessment *with hindsight* is known to be completely wrong." (Emphasis added.)

Unquestionably, as she presented herself to the Hospital in 1989, Petitioner was not an "individual with handicaps" under the Act. Heilweil's contention—that the Hospital violated the law because, unbeknownst to her or to the Hospital, she really had a handicapping condition in 1989 in the form of latent "pansinusitis" and unknown "bronchiectasis"—is wholly untenable. Neither Heilweil nor the Hospital knew of these conditions at the time the Hospital took the employment actions at issue. The totality of the information presented to the Hospital at the time it took the actions of which Petitioner complains was that something in the environment in the Blood Bank—some combination, according to Heilweil, of temperature fluctuations, heating oil fumes, natural gas fumes and soiled linen odors—exacerbated her asthma, and that she was, in her own word, "fine" when she stayed out of the Blood Bank.

On these facts, the Rehabilitation Act does not apply, and later diagnoses of new medical conditions (or old ones newly discovered) do not enlarge the Hospital's obligations under the Act. Petitioner cites no authority—statute, regulation, legislative history, case law or common sense—for the distinctly odd proposition that an employer must accommodate a condition that is unknown to both the employer and the employee. As the court below noted, "[t]he decisional law is quite to the contrary." *Heilweil*, *supra*, 32 F.3d at 725 (*citing*, *inter alia*, *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181 (6th Cir. 1993) and *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)).

CONCLUSION

For the foregoing releases, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Aaron J. Schindel
Seth M. Popper
PROSKAUER ROSE GOETZ
& MENDELSOHN
Attorneys for Respondent
1585 Broadway
New York, New York 10036
(212) 969-3000